Supreme Court, U. S.
FILED
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APPENDIX

In the

Supreme Court of the United States

October Term, 1977

No. 77-1645

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA); KENT L. COLWELL; J. WENDELL COOMBS; JOHN R. JENSEN; RALPH D. WENGER; JOHN HAVENS; TRANSAMERICA CORPORATION; TRANSAMERICA LAND CAPITAL, INC.; AND MORTGAGE TRUST OF AMERICA,

Petitioners,

—v.—

HARRY LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 5, 1978
CERTIORARI GRANTED NOVEMBER 6, 1978

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 5, 1973—Complaint filed in U.S. District Court, Southern District of New York (R. 3-22).

November 7, 1973—Stipulation and Order entered re transfer to U.S. District Court, Northern District of California (R. 1-2).

March 28, 1974—Motion to dismiss, or, in the alternative, for summary judgment and a more definite statement, with accompanying affidavits and memoranda of law, filed by defendant Transamerica Corporation (R. 115-236).

March 29, 1974—Motion to dismiss, with accompanying affidavits and memoranda of law, filed by defendants Transamerica Mortgage Advisors, Inc. (TAMA), J. Wendell Coombs, Ralph D. Wenger, Kent L. Colwell, and John R. Jensen (R. 237-273).

April 12, 1974—Motion to dismiss, or in the alternative, for summary judgment and a more definite statement filed by defendant Mortgage Trust of America (R. 274-275).

May 14, 1974—Motion to dismiss, or in the alternative, for a more definite statement filed by defendant Transamerica Land Capital, Inc. (R. 276-278).

July 24, 1974—Motion to dismiss filed by defendant John F. Havens (R. 282-284).

September 16, 1974—Memorandum in opposition to defendants' motions to dismiss, or for summary judgment, or for other relief filed by plaintiff (R. 285-321).

September 27, 1974—Hearing on defendants' motions to dismiss, or in the alternative, for summary judgment and for a more definite statement, held before the Hon. Robert H. Schnacke, United States District Court Judge (R. 380).

October 7, 1974—Order entered granting defendants' motion to dismiss with leave to amend (R. 380-382).

November 21, 1974—Order entered dismissing the case with prejudice (R. 383-384).

December 20, 1974—Notice of appeal filed (R. 385-386).

April 19, 1978—Opinion of the Court of Appeals for the Ninth Circuit filed, reversing and remanding order of dismissal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY LEWIS, *Plaintiff,* - against - TRANSAMERICA CORPORATION, TRANSAMERICA MORTGAGE ADVISORS, INC., TRANSAMERICA LAND CAPITAL, INC., J. WENDELL COOMBS, RALPH D. WENGER, KENT L. COLWELL, JOHN R. JENSEN, JOHN F. HAVENS, ALBERT H. SCHAAF, WALTER M. S. BUCK, WARREN G. HAIGHT, MICHAEL J. CASEY and MORTGAGE TRUST OF AMERICA, *Defendants.*	73 CIV. 1448

COMPLAINT

A CLASS ACTION IS BROUGHT IN THE FOURTH THROUGH SIXTH CAUSES OF ACTION
PLAINTIFF DEMANDS A TRIAL BY JURY

Filed
U.S. District Court
Southern District of New York
April 5, 1973

Transferred to
U.S. District Court
Northern District of California
November 21, 1973

No. C-73-2180 RHS

Plaintiff, by his attorneys, Wolf Popper Ross Wolf & Jones, allege upon information and belief, except as to Paragraphs "1", "2" and "3" which are alleged upon knowledge:

FIRST CAUSE OF ACTION

1. Plaintiff is the beneficial owner of shares of Mortgage Trust of America ("MTA") and was a shareholder of MTA at the time of the transactions complained of herein and has been a shareholder continuously to date.

2. Plaintiff brings this action derivatively in the right and for the benefit of MTA.

3. This action is not a collusive one to confer on this Court jurisdiction it would otherwise not have.

4. The acts complained of herein constitute violations of Sections 203, 205, 206 and 215 of the Investment Advisers Act of 1940 as amended (15 U.S.C. §§ 80b-3, 80b-5, 80b-6 and 80b-15) (the "Advisers Act"), Rule 206(4)-1(a)(5) promulgated thereunder, and the common law. This Court has jurisdiction pursuant to Section 214 of the Advisers Act (15 U.S.C. § 80b-14), and the principle of pendent jurisdiction.

5. MTA was organized, under the sponsorship of Transamerica Corporation ("Transamerica"), as a California business trust, pursuant to a Declaration of Trust dated May 23, 1969. It was established to invest in a diversified portfolio of real estate mortgages, including construction and development mortgages, permanent first and junior mortgages, other similar loans and certain equity interests in real estate. The mortgages and loans invested in and bought and sold by MTA are securities within the meaning of Section 202(a)(18) of the Advisers Act (15 U.S.C. § 80b-2(a)(18)). In or about November, 1969, MTA issued to the public approximately 3,168,500 units of its shares of beneficial interest and 3,168,500 warrants to purchase an additional share of beneficial interest. It commenced investing operations in or about June, 1969. MTA qualified as a real estate investment trust under Sections 856 through 858

of the Internal Revenue Code of 1954, as amended, for the calendar years 1970, 1971 and 1972 and it intends to continue so to qualify in future years. MTA transacts business throughout the United States, including the Southern District of New York. Certain of the acts and transactions here complained of occurred in said District.

6. As of May 31, 1972, MTA had total assets of approximately $146,398,000 and it held real estate mortgages and loans of approximately $136,000,000. As of February 28, 1972, it had undisbursed commitments on closed loans of approximately $63,000,000.

7. There are at present issued and outstanding approximately 3,382,000 shares of MTA's beneficial interest.

8. Transamerica, a Delaware corporation incorporated in 1928, is a diversified service industry oriented holding company, engaged through its operating subsidiaries, in the insurance, real estate, finance, transportation, motion picture and related industries. Transamerica Mortgage Advisors, Inc. ("Mortgage Advisors"), a Delaware corporation organized in 1969, is a wholly-owned subsidiary of Transamerica, formed to serve as investment adviser to MTA and its shareholders. Transamerica Land Capital, Inc. ("TALC"), a Delaware corporation organized in 1964, is also a wholly-owned subsidiary of Transamerica, was engaged in the business of making real estate construction and development loans; but is presently a dormant corporation. Transamerica and its wholly-owned operating subsidiaries do or transact business throughout the United States and maintain offices in, inter alia, New York, New York. Transamerica, through Mortgage Advisors, has acted as investment adviser to MTA since the latter's establishment, pursuant to an agreement dated June 24, 1969 ("the Advisory Contract") between MTA and Mortgage Advisors. However,

neither Transamerica nor Mortgage Advisors has ever registered as an investment adviser under the Advisers Act.

9. The individual defendants, J. Wendell Coombs ("Coombs"), Ralph D. Wenger ("Wenger"), Kent L. Colwell ("Colwell"), John R. Jensen ("Jensen"), John F. Havens ("Havens"), Albert H. Schaaf ("Schaaf"), Walter M.S. Buck ("Buck"), Warren G. Haight ("Haight") and Michael J. Casey ("Casey") were the original trustees of MTA, and continue to be, or were at various times material to the matters complained of, members of the board of trustees of MTA. Defendants Coombs, Wenger, Colwell and Jensen each served simultaneously as a trustee of MTA and an officer or director or both of Transamerica, Mortgage Advisors, or one or more of the other wholly-owned and controlled subsidiaries of Transamerica. Defendants Coombs, Wenger, Colwell and Jensen are hereinafter collectively referred to as the "Interlocked Trustees." The principal occupation of each of the Interlocked Trustees is his position as an officer or director of Transamerica, Mortgage Advisors, or another Transamerica subsidiary. All of the officers of MTA are officers of other Transamerica-controlled companies and all of the operating officers of MTA, who effectively make its business decisions, are subordinates of those Interlocked Trustees who are the principal executives of MTA. None of the trustees devote a substantial portion of their time to MTA's business.

10. By virtue of the Interlocked Trustees' positions with and dependence upon Transamerica and Mortgage Advisors, the latter can and do control the acts, decisions, judgments and recommendations of the Interlocked Trustees as they affect MTA, Mortgage Advisors, Transamerica and the relationships between them.

11. The individual defendants other than the Interlocked Trustees are men of affairs actively engaged in the conduct of their own substantial business interests. None of them are or have been officers of MTA, nor are they substantial holders of MTA securities, or representatives of any significant interest in MTA independent of Transamerica and Mortgage Advisors. With respect to the affairs of MTA, they have relied on, deferred to and accepted the decisions, judgments and recommendations of MTA and the Interlocked Trustees, and have not exercised their own informed and independent judgment.

12. By virtue of the foregoing, and particularly the matter set forth in paragraphs 9 through 11 hereof, Trans-America, Mortgage Advisors and the Interlocked Trustees have the power to control and dominate the board of trustees of MTA; Transamerica and Mortgage Advisors have exercised this power ever since the formation of MTA.

13. Transamerica's control and domination has permeated the affairs of MTA since prior to its formal establishment. As the sponsor of MTA, Transamerica was instrumental in the formulating and deciding the terms of its Declaration of Trust, the Advisory Contract, and the further agreements pursuant to which MTA agreed to, and did, acquire all of its initial investments from TALC. Transamerica selected all of the original members of the board of trustees and all of the officers of MTA (all of whom were employees of Transamerica subsidiaries when selected).

14. By virtue of their offices in MTA, each of the trustees, as trustees, owe to MTA the absolute duty of loyalty, the duty to avoid all dealings involving self-dealing or conflict of interest and such other fiduciary duties as are imposed by law upon any trustee. Because of their power

of domination and control, and particularly because of their power to dictate the composition of both the board of trustees and the operating management of MTA, Transamerica and Mortgage Advisors are charged with the same fiduciary duties as are the individual trustees.

15. Transamerica, Mortgage Advisors, the Interlocked Trustees and the other individual defendants caused MTA to enter into the Advisory Contract with Mortgage Advisors, whereby Mortgage Advisors would act as the investment adviser to MTA for an initial period of approximately two years. The Advisory Contract provides that Mortgage Advisors will use its best efforts to present a suitable investment program and appropriate investment opportunities to MTA; will act generally as its investment adviser; and will perform such clerical and ministerial functions in connection with MTA's portfolio as may be agreed upon. The Contract provides that MTA will pay compensation to and expenses of Mortgage Advisors as follows:

(a) an annual fee equal to 1% of all assets invested in real estate loans and equities plus the undisbursed commitments on closed loans and other closed investments up to $100,000,000; plus a fee equal to .9% of all such assets in excess of $100,000,000 but less than $200,000,000; plus a fee equal to .8% of all such assets in excess of $200,000,000; (for the purpose of computing said monthly fee, all assets are carried at book value without reduction for any liabilities or indebtedness in respect thereof); plus

(b) incentive compensation equal to 10% of the amount by which the "net profit" of MTA for each fiscal year exceeds 8%, but does not exceed 12%, of the "average net worth" of MTA during such year; plus

(c) further incentive compensation equal to 20% of the amount by which such "net profit" exceeds 12% of such "average net worth" during such year; plus

(d) such fees as are agreed upon by Mortgage Advisors and MTA in connection with the performance by Mortgage Advisory [sic] of certain other managerial and advisory functions as provided for in the Advisory Contract and of other services not provided for in the Advisory Contract; plus

(e) expenses of Mortgage Advisors paid to trustees, appraisers, independent advisers, contractors, mortgage and property servicers, consultants, managers, officers, employees and others employed by or on behalf of MTA, and expenses of servicing mortgage loans.

The amount paid by MTA to Mortgage Advisors for each year can be as much as the greater of (a) 1½% of MTA's average net assets, but without reduction for the major expenses of MTA, including such items as the cost of borrowed money; or (b) 25% of MTA's net income, but without reduction for expenses such as interest, depreciation, depletion and amortization, maintenance of assets, taxes, legal fees, proxy expenses and other costs of holding meetings of the holders of securities of MTA.

16. The Advisory Contract was unlawful when entered into and the receipt of benefits by both Transamerica and Mortgage Advisors under that agreement and in connection with such services as it, or they, have performed for MTA is and has been unlawful pursuant to Sections 203(a) and 215(b) of the Advisers Act, 15 U.S.C. §§ 80b-3(a) and 80b-15(b), because neither Transamerica nor Mortgage Advisors has ever been registered as an investment adviser under the Advisers Act.

17. The Advisory Contract and the performance thereof are and have always been grossly unfair, unjust and inequitable to MTA and its shareholders. It represents the purchase by MTA of services to be performed by Transamerica and/or Mortgage Advisors for grossly excessive consideration and constitutes a gift and waste of the funds and assets of MTA and its shareholders. The consideration provided for and paid by MTA is so grossly excessive as to require the conclusion that the making and performance of the Advisory Contract was not due to honest errors of judgment but rather to bad faith or to a reckless indifference to the rights of MTA and its shareholders. Defendants Transamerica, Mortgage Advisors and the Interlocked Trustees are the beneficiaries of this grossly unfair, unjust and inequitable agreement. The other individual defendants have aided and abetted the making and performance of the agreement. The making and performance of the Advisory Contract constitute fraud, breach of trust and such maladministration of the affairs of MTA, and such a conscious abuse of discretion by the defendants as to work a manifest gross wrong, harm and injury to MTA and its shareholders.

18. It is evident from the following that the making and performance of the Advisory Contract are and have always been grossly unfair, unjust and inequitable to MTA and its shareholders and perpetrates a fraud upon MTA and its shareholders, who have been and are being substantially damaged as a result thereof:

(a) The total fees paid by MTA to Mortgage Advisors are grossly excessive when compared to the services received. Pursuant to the Advisory Contract these fees can be as much as 1½% per year of the average invested assets of MTA, but the same services performed by an internal staff could be obtained at a cost of less than ½ of 1% of the total assets of MTA.

(b) The basic fee to be paid by MTA to Mortgage Advisors as well as the overall limit on compensation is measured against a base which includes the undisbursed commitments on closed loans and other closed investments. However, such undisbursed commitments do not earn a rate of return high enough to justify such a fee, and in many cases they earn no return at all.

(c) In the computation of invested assets for the determination of the basic fee and the overall limit on compensation, assets are carried at book value without reduction for amortization, depreciation or depletion. This practice inherently results in overcharging because Mortgage Advisors thereby earns a fee on assets not earning a return for MTA and its shareholders.

(d) The Advisory Contract provides that MTA will pay a 10% bonus to Mortgage Advisors, as aforementioned, if the net income of MTA exceeds 8% of its average net worth during the year; and it provides for a further 20% bonus on net income in excess of 12% of such average net worth. However, it does not provide for any corresponding decreases where net income falls below the set percentage. Such incentive provisions encourage Mortgage Advisors to make high risk, high interest loans and to engage in other high risk investments which may create losses for MTA and its stockholders.

19. The Advisory Contract was initially entered into for a term of approximately two years. It can be renewed and extended for successive periods of one year each. All the trustees and Mortgage Advisors intend to renew and extend the Advisory Contract this year and in future years

for the remainder of the duration of the life of MTA, on terms which are substantially the same as now exist or on terms which will continue to be favorable to Mortgage Advisors and unfair to MTA and its shareholders.

20. By virtue of the foregoing, defendants, by participating in, approving, or acquiescing in the Advisory Contract, have breached and threaten to continue to breach their fiduciary duties to MTA and its shareholders, or have aided and abetted in the breach of said fiduciary duties to MTA and its sha.. .holders.

21. By reason of the foregoing, the defendants other than MTA have violated and will continue to violate Section 206(1) and (2) of the Advisers Act in that they have, directly and indirectly, by the use of the mails and other means or instrumentalities of interstate commerce employed devices, schemes and artifices to defraud MTA and its shareholders and they have engaged in transactions, practices and a course of business which were intended to and did operate as a fraud upon MTA and its shareholders.

22. By reason of the foregoing, the defendants other than MTA have violated and will continue to violate Section 206(4) of the Advisers Act and Rule 204(4)-1(a)(5) thereunder in that they have, directly and indirectly, by the use of the mails and means and instrumentalities of interstate commerce (a) engaged in acts, practices or a course of business which is fraudulent, deceptive or manipulative and (b) published, circulated and distributed advertisements which contained untrue statements of material facts or which were otherwise false or misleading.

23. By reason of the foregoing, MTA and its shareholders have suffered damages in the millions of dollars, the precise amount of which can only be determined upon an accounting. Furthermore, unless this Court permanently

enjoins the defendants from renewing or extending the Advisory Contract and from carrying out the terms and provisions of the Advisory Contract the aforesaid violations will continue throughout the duration of the life of MTA.

24. Plaintiff has made no demand upon the board of trustees of MTA to bring and prosecute this action. Such a demand would have been futile because the board of trustees are dominated and controlled by defendants Transamerica and Mortgage Advisors and they would not diligently prosecute an action against said defendants. Furthermore, the trustees are themselves defendants in this action. Any demand upon the trustees to redress the wrongs herein complained of would, in effect, constitute a demand that they bring action against themselves and would have been futile.

25. Demand upon the shareholders of MTA to bring this action was not made and would have been futile because:

A. Under the Declaration of Trust of MTA, the management of its affairs, including the bringing of suit, is entrusted to the trustees and not the shareholders; the shareholders cannot by resolution or otherwise require MTA or its trustees to bring an action.

B. A shareholder resolution demanding the bringing of suit would be futile since control of the action would be in the hands of the very persons alleged to be wrongdoers and cannot properly be prosecuted by them.

C. MTA has approximately 32,000 shareholders scattered over the United States. Demand upon the shareholders to take action would cast an unconscionable financial burden on the plaintiff in that the plaintiff would have to solicit proxies from all the share-

holders residing throughout the country. It would involve the conduct of a proxy fight which would entail prohibitive expenses and would cause undue loss of time and would also create a danger that some claims might eventually be barred by the Statute of Limitations.

26. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

27. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 14 with the same force and effect as if set forth at length herein.

28. In or about December, 1969, and pursuant to the terms of certain agreements concerning initial investments, Transamerica, TALC, Mortgage Advisors, the Interlocked Trustees and the other individual defendants caused MTA to purchase from TALC a portfolio of first mortgages and construction and development loans, and commitments therefor for the sum of approximately $20,550,528, which constituted approximately one-half of its entire initial investment portfolio. Immediately thereafter, TALC, having thus disposed of its entire portfolio, became inactive; and substantially all of its employees became employees of Mortgage Advisors.

29. The aforesaid purchases were unlawful when made and the receipt of benefits by Transamerica, TALC or Mortgage Advisors in connection therewith is and was unlawful in that, inter alia, the transaction was permeated with self-dealing and conflict of interest; and the trustees of MTA, Transamerica and Mortgage Advisors violated their duties of undivided loyalty and failed to exercise their independent judgment solely for the best interest of MTA

in making said purchases and otherwise in acquiring MTA's initial portfolio.

30. The aforesaid purchases and agreements to purchase by MTA from TALC were grossly unfair, unjust and inequitable to MTA and its shareholders. Defendants Transamerica, TALC, Mortgage Advisors and the Interlocked Trustees are the beneficiaries of these grossly unfair, unjust and inequitable transactions. The other individual defendants participated in or aided and abetted in the making and performance of these agreements and purchases. The making and performance of those agreements constitutes a fraud, a breach of trust and such maladministration of the affairs of MTA, and such a conscious abuse of discretion by the defendants as to work a manifest gross wrong, harm and injury to MTA and its shareholders. It is evident from the following that the aforesaid agreement and purchases were grossly unfair, unjust and inequitable to MTA and its shareholders, who have been and are being substantially damaged as a result thereof:

(a) As a result of the aforesaid transactions Transamerica and TALC received large profits and other benefits including income tax benefits. Such profits exceeded those which could have been obtained by them upon the disposition of the various investments in arms' length sales to independent buyers.

(b) The mortgages and other interests purchased by Investors from TALC were selected solely by Transamerica and TALC. The trustees did not review other holdings of Transamerica and TALC nor did they consider or look for other potential investments in order to obtain the best possible portfolio for MTA; nor did they exercise their judgment and discretion as

fiduciaries in evaluating the potential investments selected by Transamerica and TALC.

(c) The mortgage and other investments purchased by MTA were of lower quality and have not performed as well as a portfolio which MTA could have purchased from third parties dealing at arms' length for the same price, nor have they performed as well as a portfolio which MTA could have purchased from Transamerica and TALC if Transamerica and TALC had offered and the trustees had selected from the best of such investments held by them.

31. Insofar as Transamerica and its affiliates received profits and other benefits including income tax benefits as a result of the aforesaid purchases and agreements to purchase, it or they received more compensation from MTA and its shareholders [sic] than was permissible under the existing agreement described in paragraph 15 of this complaint, and therefore, the receipt of such benefits was unlawful. The receipt of such benefits was also unlawful pursuant to Sections 203(a) and 215(b) of the Advisers Act, 15 U.S.C. §§ 80b-3(a) and 80b-15(b), because neither Transamerica nor Mortgage Advisors has ever been registered as an investment adviser under the Advisers Act.

32. Plaintiff repeats and realleges each and every allegation contained in paragraphs 20 through 26 with the same force and effect as if set forth at length herein.

THIRD CAUSE OF ACTION

33. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 18 with the same force and effect as if set forth at length herein.

34. Pursuant to the Advisory Contract, Transamerica and Mortgage Advisors have the duty to MTA and its shareholders to serve them as their investment and financial adviser and consultant in connection with policy decisions; to provide research and economic and statistical data in connection therewith and also with respect to investments; and to consult with MTA and to furnish it with advice and recommendations with respect to making, acquiring, holding and disposing of real estate loans and other investments.

35. Transamerica and Mortgage Advisors have failed to provide MTA with the full benefit of their knowledge with respect to advice, consultation and recommendations concerning suitable real estate loans and other investments. Instead of advising MTA as to all the suitable investments which it might have made, Transamerica and Mortgage Investors [sic] have presented only some of the possibilities of which they had knowledge. They have not advised MTA as to the best investments which would have been available to MTA, but instead have acquired or retained those investments for other Transamerica affiliates.

36. The individual defendants as trustees of MTA have failed to require Transamerica and Mortgage Advisors to advise MTA as to the best, or all the suitable investments which it might have made. Instead they have allowed Transamerica to acquire or retain for the portfolios of other affiliates the best investments which should have been taken for MTA.

37. As a result of the foregoing the investment portfolio of MTA and its shareholders has been of lower quality and has not performed as well as it would have if MTA had been able to acquire the best investments known to Transamerica and Mortgage Advisors.

38. The withholding of the best investment opportunities by Transamerica and Mortgage Advisors (and the acquisition or retention thereby), the failure of the trustees to require them to advise MTA with respect to the best investments available and the receipt of benefits by Transamerica and its affiliates as a result thereof is and has been grossly unfair, unjust and inequitable to MTA and its shareholders. Defendants Transamerica, Mortgage Advisors and the Interlocked Trustees are the beneficiaries of this grossly unfair, unjust and inequitable course of conduct. Transamerica, Mortgage Advisors and the other individual defendants have participated in and aided and abetted said course of conduct. It constitutes a fraud, a breach of trust and such maladministration of the affairs of MTA, and such a conscious abuse of discretion by the defendants as to work a manifest gross wrong, harm and injury to MTA and its shareholders.

39. The aforesaid course of conduct constitutes a breach of the Advisory Contract by Transamerica and Mortgage Advisors.

40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 20 through 26 with the same force and effect as if set forth at length herein.

FOURTH CAUSE OF ACTION—CLASS ACTION

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4 through 23 and 26 with the same force and effect as if set forth at length herein.

42. Plaintiff brings this action representatively on behalf of himself and all the shareholders of Investors similarly situated.

CLASS ACTION ALLEGATIONS

43. Plaintiff brings this action as a class suit pursuant to Section 23(b)(1)(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure.

44. There are approximately 32,000 shareholders of MTA located in various parts of the country who are members of the class. Plaintiff and his counsel, who are experienced in the litigation of class actions and litigation under the federal securities laws, will fairly and adequately protect the interests of the other shareholders of MTA similarly situated. There are numerous common questions of law and fact, including whether the agreement between MTA and Mortgage Advisors is unfair and inequitable to the shareholders of MTA and whether the acts and conduct of the defendants are in violation of Section 203, 206 and 215(b) and Rule 206(4)-1(a)(5) of the Advisers Act, and the common law. Common questions of law and fact predominate over questions affecting all the individual members of the class. The class action is superior to other methods for efficient adjudication of the claims herein since it would not be economical or feasible for the shareholders of MTA to institute individual actions against the defendants and it would be virtually impossible for all said shareholders to intervene as parties to this action.

FIFTH CAUSE OF ACTION—CLASS ACTION

45. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4 through 14, 26, 28 through 31 and 42 through 44, with the same force and effect as if set forth at length herein.

SIXTH CAUSE OF ACTION—CLASS ACTION

46. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4 through 18, 26, 34 through 40 and 42 through 44 with the same force and effect as if set forth at length herein.

WHEREFORE, plaintiff prays for the following relief:

(a) That the defendants be enjoined during the pendency of this action and permanently from taking any action to renew, extend, or carry out the Advisory Contract between MTA and Mortgage Advisors and Transamerica;

(b) That the Court direct and conduct a trial before the renewal or extension of said Advisory Contract and upon the conclusion of said trial, that a restraining order be issued enjoining the defendants from taking any action to renew, extend or carry out said Advisory Contract;

(c) That the Advisory Contract be set aside and, if the Advisory Contract is renewed or extended before the trial, that all such renewals or extension be set aside and that all fees and expenses and other consideration paid to Mortgage Advisors or Transamerica pursuant to said Advisory Contract and any renewals or extensions thereof be returned to MTA.

(d) That the defendants other than MTA be required to account for and pay over all damages sustained by MTA or by the plaintiff and other shareholders of MTA similarly situated, and all profits made by any of said defendants by reason of the acts complained of herein.

(e) That plaintiff be allowed the costs and expenses of this action including reasonable attorneys' fees and accountants' fees.

(f) That plaintiff have such other, further and different relief as to this Court may seem just and equitable in the premises.

WOLF POPPER ROSS WOLF & JONES

By /s/ DONALD N. RUBY
A Member of the Firm
Attorneys for Plaintiff
845 Third Avenue
New York, New York 10022
PL 9—4600

STATE OF NEW YORK
COUNTY OF NEW YORK—ss.:

HARRY LEWIS, being duly sworn, deposes and says that he is the plaintiff in the within action and has read the foregoing complaint and knows the contents thereof to be true and that the same is true to the deponent's knowledge except as to those matters therein stated to be alleged upon information and belief and as to those matters deponent believes them to be true.

/s/ HARRY LEWIS
Harry Lewis

(Jurat omitted in printing.)

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J. Wendell Coombs, Ralph D. Wenger,
Kent L. Colwell, and John R. Jensen.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HARRY LEWIS, Plaintiff, v. TRANSAMERICA CORPORATION, et al., Defendants.	No. C-73-2180 RHS

NOTICE OF MOTION
AND
MOTION TO DISMISS

Fed. R. Civ. P. 12

Filed
U.S. District Court
Northern District of California
March 29, 1974

To the Parties and To Their Counsel of Record:

PLEASE TAKE NOTICE that on Friday, June 21, 1974, at 9:30 a.m., or as soon thereafter as counsel can be heard, and before The Hon. Robert H. Schnacke, Judge of the District Court, Courtroom No. 5, 17th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, defendants Transamerica Mortgage Advisors, Inc. (TAMA), J. Wendell Coombs, Ralph D. Wenger, Kent L. Colwell and John R. Jensen, will move for an order of this Court dismissing the complaint.

The above-described motion will be made and based on the accompanying Memorandum in Support of Motion to Dismiss and Affidavit of Robert W. Cramer in Support of Motion to Dismiss; and on all of the pleadings and other papers on file in this case.

Dated: March 28, 1974.

JOHN M. ANDERSON
WILLIAM A. FALIK
LANDELS, RIPLEY & DIAMOND

Attorneys for Defendants,
Transamerica Mortgage
Advisors, Inc., (TAMA),
J. Wendell Coombs, Ralph
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and John R. Jensen.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HARRY LEWIS,
Plaintiff,
v.
TRANSAMERICA CORPORATION, et al.,
Defendants.

No. C-73-2180 RHS

ORDER

Filed
U.S. District Court
Northern District of California
October 7, 1974

The motion of defendants, Transamerica Mortgage Advisors, Inc., et al., to dismiss; and the motions of defendants Transamerica Corporation, Transamerica Land Capital, Inc., and Mortgage Trust of America, to dismiss or, in the alternative, for summary judgment and for a more definitive statement, came on for hearing on Friday, September 27, 1974.

The plaintiff, Harry Lewis, was represented by Francis J. McTernan, Esq., and Messrs. Garry, Dreyfus, McTernan, Brotsky, Herndon & Pesonen of San Francisco. The defendants, Transamerica Mortgage Advisors, Inc., J. Wendell Coombs, Ralph D. Wenger, Kent L. Colwell and John R. Jensen, were represented by John M. Anderson, Esq., and Messrs. Landels, Ripley & Diamond of San Francisco. The

defendants, Transamerica Corporation and Transamerica Land Capital, Inc., were represented by Joseph Martin, Jr., Esq., and Messrs. Pettit, Evers and Martin of San Francisco. The defendant, Mortgage Trust of America was represented by Jon F. Hartung, Esq., and Messrs. Farella, Braun & Martel of San Francisco. Defendant, John F. Havens was represented by Neil L. Shapiro, Esq., of Messrs. Cooper, White & Cooper of San Francisco.

The Court having received and considered written memoranda from the parties in support of and in opposition to the above-described motions; having heard oral argument; and having considered the affidavits, pleadings and other papers on file in this case, makes the following

ORDER:

1. The Court having determined that since Section 206 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-6) affords no private right of action, and that consequently the Court has no jurisdiction of the plaintiff's claims, the defendants' motion to dismiss is *granted*.

2. The alternate motions of defendants Transamerica Corporation, Transamerica Land Capital, Inc., and Mortgage Trust of America for summary judgment or for a more definite statement, having become moot by reason of the foregoing order, are *denied* without prejudice.

3. Plaintiff may have 45 days from September 27, 1974, within which to file an amended complaint. If the plaintiff does not file an amended complaint within the foregoing period, then this case shall be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Dated: Oct 7 1974

/s/ ROBERT H. SCHNACKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HARRY LEWIS,
Plaintiff,
v.
TRANSAMERICA CORPORATION, et al.,
Defendants.

No. C-73-2180 RHS

ORDER

Filed
U.S. District Court,
Northern District of California
November 21, 1974

WHEREAS, the motion of defendants, Transamerica Mortgage Advisors, Inc., *et al.*, to dismiss; and the motions of defendants Transamerica Corporation, Transamerica Land Capital, Inc., and Mortgage Trust of America, to dismiss, or, in the alternative, for summary judgment and for a more definite statement, came on for hearing on Friday, September 27, 1974; and

WHEREAS, and pursuant to an order dated and filed October 7, 1974, this Court granted the motion of defendants, Transamerica Mortgage Advisors, *et al.*, to dismiss, but allowing the plaintiff 45 days from September 27, 1974, within which to amend; and

WHEREAS, the plaintiff, Harris Lewis, has failed to amend his complaint within the time allowed, or at all, the court makes the following

ORDER:

Pursuant to Fed. R. Civ. P. 41(b), this case is dismissed with prejudice as against each and all of the defendants, and each and all of the defendants are awarded their respective costs.

Dated: Nov 21 1974

/s/ ROBERT H. SCHNACKE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY LEWIS,
Plaintiff-Appellant,
v.
TRANSAMERICA CORP., et al.,
Defendants-Appellees.

No. 75-1285

OPINION RE APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed
U.S. Court of Appeals
For the Ninth Circuit
April 19, 1978

Appeal from the United States District Court
For the Northern District of California

Before: BROWNING and WALLACE, Circuit Judges, and EAST,* Senior District Judge

EAST, Senior District Judge:

The plaintiff-appellant Harry Lewis (Lewis) appeals from an order entered by the District Court on November 21, 1974 dismissing the action with prejudice on the grounds "Section 206 of the Investment Advisers Act of 1940 (15

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

U.S.C. § 80b-6) [Advisers Act] affords no private right of action, and that consequently the Court has no jurisdiction of the plaintiff's claims . . . ." We vacate the order and remand.

Lewis' Complaint:

Lewis is a shareholder of the defendant-appellee Mortgage Trust of America (Trust), and his complaint presents three shareholder derivative and three class actions for violation of the Advisers Act and common law fiduciary duties. He alleges in substance:

The Trust was organized as a California business trust and is qualified as a real estate investment trust under the Internal Revenue Code. It invests primarily in construction and development first mortgage loans. None of its investments have been listed on any national or local securities exchange or offered for trading in any over-the-counter market. The original officers and employees of the Trust were formerly associated with the defendant-appellee Transamerica Land Capital, Inc. (TALC), a "first tier" subsidiary of the defendant-appellee Transamerica Corp. (Transamerica). The Trust purchased from TALC its original portfolio of mortgages. The defendant-appellee Transamerica Mortgage Advisors, Inc. (Mortgage Advisors), a Delaware corporation and a "third tier" subsidiary of Transamerica, is retained as the Trust's mortgage adviser. It advises the Trust on various real estate investments and administers its day-to-day operations. The Trust is and always has been Mortgage Advisors' only client. Transamerica is the parent of Mortgage Advisors and the sponsor of the Trust. Nine individual defendants-appellees are trustees of the Trust.

Lewis' Issue on Review:

Does the Advisers Act give rise to an implied private right of action for injunctive relief and damages on behalf of persons injured by violations of its provisions?

Defendants-Appellees' Issues on Review:

In view of the naked holding of a lack of jurisdiction, the District Court did not reach the following issues which the defendants present for review:

(1) Whether the several defendants fall within the scope of the Advisers Act.

(2) Whether the class action claims are proper.

(3) Whether Lewis has standing to maintain a derivative action without having made a demand upon the trustees to act.

Discussion:

Since the District Court did not first consider and adjudicate those issues raised by the defendants, we decline to now do so. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Hector v. Wiens*, 533 F.2d 429, 433 (9th Cir. 1976).

At the time of the District Court's consideration of its ultimate order of dismissal of the action for lack of jurisdiction, the circuit case law on the issue was nil. At that time only the following District Court decisions were available for consideration: *Bolger v. Laventhol, Krekstein, Horwarth & Horwarth*, 381 F.Supp. 260, 263 (S.D.N.Y. 1974) (recognizing an implied private right of action). *Greenspan v. del Toro*, No. 73-638 CIV JE (S.D. Fla. May 17, 1974), *appeal dismissed for want of prosecution*, No. 74-2943 (5th Cir. Sept. 5, 1974); and *Gammage v. Roberts, Scott & Co.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,761 (S.D. Cal. 1974) (no private right of action).

We now have the benefit of the decisions of the Courts of Appeals for the Fifth and Second Circuits finding an implied private right of action under the Advisers Act. *Wilson v. First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978); *Abrahamson v. Fleschner*, 568 F.2d 862 (2d Cir. 1977).[1]

Without reiterating their able discussions, we adopt the rationale of the majorities in *Abrahamson* and *Wilson*. Accordingly, we hold that the implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation. The District Court holds subject matter jurisdiction to en-

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1. See the following for support of the majorities' rationale in *Abrahamson* and *Wilson*; *J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); and *Bolger's* clarifying discussion of the goal of Congress in enacting the Advisers Act, 381 F. Supp. at 263.

The following District Courts have, since the entry of the order of dismissal in this case, held that an implied right of private action exists under the Advisers Act: *Jones v. Equitable Life Assurance Society*, 409 F. Supp. 370 (S.D.N.Y. 1975), *accord, Angelakis v. Churchill Management Corp.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,285 (N.D. Cal. 1975); and *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F.Supp. 171 (N.D. Cal. 1977).

The Securities Exchange Commission has submitted to Congress a proposed amendment to the Advisers Act which provides explicitly for a private right of action under the Advisers Act. See Investment Advisers Act Release No. 491, 8 SEC Docket 744 (Dec. 15, 1975). In announcing its proposal, the SEC repeated its view that the existing language was sufficient to imply a private right of action. Its proposal was intended to put to rest those few decisions which have found no implied right of action. "The commentators who have reviewed these decisions agree that a private right of action should be implied under the Advisers Act. Note, *Private Causes of Action Under Section 206 of the Investment Advisers Act*, 74 Mich. L. Rev. 308 (1975); Lybecker, Advisers Act Developments, 8 Review of Securities Regulations 927, 934 (April 23, 1975); Note, *Bolger v. Laventhol, Krekstein, Horwarth & Horwarth: Private Rights of Action Under the Investment Advisers Act*, 48 Temple L.Q. 433 (1975)." *Abrahamson*, 568 F.2d at 872, n. 17.

tertain such actions and pendens state claims pursuant to 28 U.S.C. § 1331.[2]

The District Court's order of dismissal is vacated and the cause remanded to the District Court for further proceedings consistent herewith.

ORDER OF DISMISSAL VACATED AND CAUSE REMANDED.

WALLACE, Circuit Judge, Dissenting:

This case presents an issue of first impression in our circuit on which reasonable minds may differ. I recognize the strength of the opinions and the articles cited by the majority. I am persuaded, however, by the analysis of Judge Gurfein in *Abrahamson v. Fleschner,* 568 F.2d 862, 879 (2d Cir. 1977) (concurring and dissenting), and therefore respectfully dissent.

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2. "The trial court stated that it was dismissing for lack of subject matter jurisdiction. According to the district court's analysis, the complaint more properly should have been dismissed for failure to state a claim upon which relief can be granted. *See Mobil Oil Corp. v. Kelley,* 493 F.2d 784, 786 (CA5), *cert. denied,* 419 U.S. 1022, 95 S. Ct. 498, 42 L.Ed.2d 296 (1974). As pertains to the asserted cause of action under the IAA, general federal question jurisdiction is conferred by 28 U.S.C. § 1331 (1970). *See Abrahamson v. Fleschner,* 568 F.2d 862, at 867 n. 5 (CA2 1977), (the dissent and majority agree on this point)." *Wilson,* 566 F.2d at 1237 n. 2.